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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 794

JAMES R. HOFFA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 795

THOMAS EWING PARKS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 796

LARRY CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 797

EWING KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Hoffa Pet. App. 1a–57a) is reported at 349 F. 2d 20. The

opinion of the court of appeals on a pretrial petition for mandamus is reported at 323 F. 2d 178, certiorari denied, 375 U.S. 907. A memorandum opinion of the district court denying pretrial motions challenging the array and the panel of petit jurors (1 D.A. 314–321) [1] is reported at 235 F. Supp. 611. A memorandum opinion denying a motion to disqualify the trial judge in connection with a motion for a new trial on the ground of newly discovered evidence is reported at 245 F. Supp. 772.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1965 (Hoffa Pet. App. 58a). A timely petition for rehearing filed by all petitioners was denied on October 7, 1965. On October 18 and 19, 1965, Mr. Justice Stewart extended petitioners' time within which to file petitions for writs of certiorari to and including December 6, 1965. All the petitions were filed on December 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony of a government witness was obtained in violation of petitioners' constitutional rights under the Fourth, Fifth or Sixth Amendments.

[1] "D.A." preceded by a volume number represents petitioners' joint appendix, which comprised 7 volumes, in the court of appeals. "G.A." represents the government's one-volume appendix in the court of appeals. "Hoffa Pet.", "Parks Pet.," "Campbell Pet." and "King Pet." refer to the petitions for writs of certiorari in Nos. 794, 795, 796 and 797, respectively.

2. Whether the jury commission in the Middle District of Tennessee improperly delegated its duties to "suggesters."

3. Whether petitioners were entitled to examine the suggesters in open court at a pretrial hearing.

4. Whether a proper *voir dire* was conducted of the grand jury which indicted petitioners.

5. Whether petitioner Hoffa's indictment was invalid because it was based solely on hearsay evidence.

6. Whether the indictment was insufficient in failing to allege how the charged aiders and abettors assisted the principal offenders.

7. Whether motions for severance of defendants were properly denied.

8. Whether a hearing should have been held on the first day of trial on petitioners' motions to strike the petit jury array.

9. Whether petitioner Hoffa was deprived of a fair trial by prejudicial publicity.

10. Whether an excessive number of deputy marshals were assigned to attend the court and jury.

11. Whether a transcript reporting what petitioner Hoffa and his counsel were told in a chambers conference was erroneously admitted into evidence.

12. Whether the court's instructions regarding coconspirators' out-of-court declarations were correct.

13. Whether cross-examination of a government witness was improperly curtailed.

14. Whether offered evidence which allegedly impeached a government witness was erroneously excluded.

15. Whether petitioners requested that a government witness be recalled for further cross-examination on material that had become available after he testified.

16. Whether the district court erred in failing to give a cautionary informer instruction.

17. Whether the evidence was sufficient to sustain petitioner Campbell's conviction.

18. Whether government agents engaged in improper surveillance during the course of the trial.

19. Whether petitioner Parks was deprived of a fair trial because F.B.I. agents routinely burned handwritten notes which were substantially incorporated in formal reports produced for defense inspection.

20. Whether government counsel impermissibly referred to petitioner King's prior assertion of the privilege against self-incrimination.

21. Whether the government's summation was improper.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted on counts 3 and 5 of a five-count indictment charging a conspiracy and substantive violations of 18 U.S.C. 1503.[2] Count 3, on which petitioners Hoffa, Campbell and Parks were

[2] The conspiracy count, which named only petitioner Hoffa as a defendant, was severed before trial (1 D.A. 26, 199). Hoffa was acquitted on count 2 at the conclusion of the government's proof (1 D.A. 43; 4 D.A. 2028), and the jury entered a verdict of not guilty as to all defendants charged in count 4 (1 D.A. 60; 7 D.A. 3292).

convicted, charged them with having endeavored corruptly to influence Gratin Fields, a petit juror in a trial in the Middle District of Tennessee in which petitioner Hoffa was the only defendant. Count 5, on which petitioners Hoffa and King were convicted, charged them with having endeavored corruptly to influence Mrs. James M. Paschal, another petit juror in the same trial (1 D.A. 69–71).[3] Hoffa was sentenced to consecutive four-year terms of imprisonment and a $5,000 fine on each count. The other petitioners were sentenced to three-year terms of imprisonment (7 D.A. 3567–3570). The court of appeals unanimously affirmed all the convictions.

The government's evidence may be briefly summarized:

1. Petitioner Hoffa was the only defendant standing trial in *United States* v. *Hoffa and Commercial Carriers, Inc.* ("the Test-Fleet case"), a criminal case in which the trial began before United States District Judge William E. Miller in Nashville, Tennessee, on October 22, 1962 (2 D.A. 586, 590; 4 D.A. 1882). On the evening of October 22, petitioner Hoffa told Edward G. Partin, an associate whom he had known since 1957 (3 D.A. 1177), who was in Nashville on personal matters,[4] and who had been asked by government agents to report any jury tampering or other

[3] The indictment was returned in the Middle District on May 9, 1963. The case was transferred for trial to the Eastern District on December 28, 1963, and the trial commenced on January 20, 1964 (1 D.A. 1, 22, 28).

[4] There was substantial testimony throughout the trial regarding Partin's relationship to and communication with federal agents. In brief, the evidence showed that he had first com-

illegal activities (3 D.A. 1192, 1202; 4 D.A. 2068; 5 D.A. 2438–2439; 6 D.A. 2996), that he "was going to get to one juror or try to get to a few scattered jurors and take [his] chances" (3 D.A. 1353). Hoffa also

municated in September 1962 with a member of the district attorney's office of the Nineteenth Judicial District in Louisiana and reported to him petitioner Hoffa's plot to assassinate Robert F. Kennedy, then Attorney General of the United States (3 D.A. 1540; 4 D.A. 2037–2039; 6 D.A. 2988). Department of Justice attorneys were present at two subsequent meetings with Partin and the State officials (5 D.A. 2393–2395; 6 D.A. 2612–2616). The State thereafter conducted an investigation, in the course of which Partin cooperated with the district attorney's office and recorded many telephone conversations he had with various people, including two with petitioner Hoffa. Partin called Hoffa, not at the request of the State official, but for a personal reason which had existed "long before" (4 D.A. 2046). The result of the two recorded conversations and two others which were not recorded (6 D.A. 2993–2994) was an agreement that Partin would come to Nashville on Monday, October 22, the day on which the Test-Fleet trial was to begin (6 D.A. 2826–2828). A Department of Justice attorney was then informed by the member of the State district attorney's office that Partin would be going to Nashville (4 D.A. 2062; 6 D.A. 2992). The Department of Justice attorney arranged to meet Partin and the State official in Atlanta. When Partin said during the meeting that he intended to go to Nashville to meet Hoffa, he was requested by the attorney to "keep his eyes and ears open" and to call Walter J. Sheridan, a federal official, if he saw any evidence of jury tampering or other illegal activities (3 D.A. 1192, 1202; 4 D.A. 2068; 5 D.A. 2438–2439; 6 D.A. 2996).

Shortly after Partin's arrival in Nashville he learned that attempts were being made improperly to influence jurors (3 D.A. 1181–1182). He called Sheridan and reported this information (3 D.A. 1208, 1210–1211, 1296–1297). Partin left Nashville the following day, but returned on ten later occasions during the trial for periods lasting from several hours to four or five days. When in Nashville, he called Sheridan almost on a daily basis (3 D.A. 1213, 1298, 1465). He was never requested or

told Partin on the following day that he intended to have Partin "pass something for him" and gestured by hitting his rear pocket (3 D.A. 1364).

On the morning of October 24, a juror who had been tentatively seated was excused after Judge Miller advised counsel and Hoffa that the juror had reported having been offered $10,000 in one-hundred-dollar bills by his next-door neighbor in connection with his jury service in the trial (4 D.A. 1936, 1963–1964). Partin asked Hoffa on the following day about his earlier request that he "pass something," and Hoffa replied, "[t]he dirty bastards [*sic*] went in and told the Judge that his neighbor had offered him $10,000. We are going to have to lay low for a few days" (3 D.A. 1369).

2. The jury selection process was concluded on October 25, and the jury was sworn on that day (2

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encouraged by Sheridan to stay in Nashville or to return (3 D.A. 1252–1253, 1304; 6 D.A. 3083). Partin received no instructions from Sheridan (3 D.A. 1221), nor did he suggest courses of conduct to Sheridan (3 D.A. 1303). Partin testified, "Mr. Hoffa is the one told me he wanted me to stick around, not Mr. Sheridan" (4 D.A. 1766). Partin was not paid or promised anything by the government for his conduct during the Test-Fleet trial (3 D.A. 1219).

Sheridan testified that Partin's communications were predominantly concerned with illegal activity regarding the jury and "the comings and goings of people * * * [and conduct] which I would say, whether it was illegal or not, it was in my mind improper" (3 D.A. 1298). There were "very small bits" of conversations or comments by attorneys (3 D.A. 1304), and, in one instance, Sheridan was told that written questions and answers had been prepared for certain truckdriver-witnesses (3 D.A. 1314). None of these matters related in any way to the evidence presented at this trial.

D.A. 588). On October 26, petitioner King, who was president of the Nashville Local of the International Brotherhood of Teamsters, advised Partin that he intended to speak to a friend of a female juror "to get her swayed toward Mr. Hoffa" and that although the juror and her husband were well off, "they loved money and $10,000.00 was a lot of money" (3 D.A. 1375–1376). On the following day—a Saturday—King visited Oscar Pitts (who testified on behalf of the government), a member of his local union, and discussed with Pitts the financial condition of the juror (Mrs. Paschal) and her husband, who was a member of the Tennessee State Highway Patrol and a friend of Pitts' (2 D.A. 1005–1010). Pitts advised King that Paschal desired a promotion in the highway patrol, and King said he would obtain such a promotion if Paschal "could talk to his wife" (2 D.A. 1010–1011).

On November 5, in Partin's presence, Hoffa berated King for not doing what Hoffa "told him to do." Hoffa then said to Partin, "King keeps telling me he can get the patrolman but he don't get to him. He keeps talking about it and fumbling around" (3 D.A. 1389–1390). King thereafter advised Partin that he was arranging a midnight meeting with the highway patrolman at a country spring (3 D.A. 1391).

On November 14, Hoffa admonished King for "not making a contact like he told him he would." He told King that he "wanted some insurance" (3 D.A. 1400), and called him "a stupid S.O.B. for thumbing around and not getting the job done" (3 D.A. 1403). On

the following day Hoffa asked King in Partin's presence whether he had "made the contacts" (3 D.A. 1405).

On the evening of Saturday, November 17, King received a telephone signal from Pitts, and he drove to Woodbury, where both Pitts' and Paschal's homes were located (2 D.A. 966, 1016). Pitts met Paschal as the patrolman was coming off duty at 1:00 a.m. and followed him to the Paschal home (2 D.A. 1019; 3 D.A. 1093–1094). In the driveway of the Paschal residence, Pitts told Paschal that King wanted to see him about a promotion, and they arranged to meet shortly at a river spring (3 D.A. 1096–1097). Pitts drove King to the rendezvous at the spring (2 D.A. 1028–1029), where, in Paschal's patrol car, King told Paschal that he could obtain a promotion for him (3 D.A. 1101–1102). When Paschal responded that he would appreciate any help he could get, King replied, "your wife is on this jury," and asked if Paschal could talk to her (3 D.A. 1102). King then advised Paschal that if he would speak to his wife King would get him a promotion. Paschal agreed to speak to his wife (3 D.A. 1103). On November 20 Hoffa told Partin that he "was disturbed because the Highway Patrolman wouldn't take the money. * * * [I]f he had of [*sic*] taken the money it would have pinned him down and he couldn't have backed up" (3 D.A. 1409, 1410).

3. Petitioner Campbell was a Negro business agent of the local union in Detroit of which Hoffa was president (5 D.A. 2270). Campbell arrived in Louisville,

Kentucky, two days before the beginning of the Test-Fleet trial and checked into a guest house where, on the evening of October 21, he received a call from petitioner Parks, his uncle, who resided in Nashville (2 D.A. 823–825, 831). On that same evening Campbell placed two calls from pay telephones in Louisville to petitioner Hoffa's residence in Detroit (2 D.A. 861–863). Ten minutes after the second call, a telephone call was made from a pay telephone in the neighborhood of Hoffa's residence to the pay telephone used by Campbell, and immediately thereafter a call was placed from the Detroit telephone to petitioner Hoffa's hotel suite in Nashville (2 D.A. 927–928).[5] Campbell then called Parks from pay telephones in Louisville each evening from October 22 to October 25, and three times from Louisville and Detroit during the following week (2 D.A. 865–867, 871–872, 876–877, 896–900).[6]

Campbell told the proprietor of the guest house in Louisville that he might go to Nashville and that he would return over the weekend (2 D.A. 837). He advised a female companion in Louisville that "his boss was in trouble" (2 D.A. 854). The same companion, who was with him on a daily basis, testified

[5] These and the other long-distance telephone calls relied on by the government were proved by telephone company toll tickets and by the testimony of petitioners Campbell and Parks, who admitted having engaged in a series of telephone conversations at this time (5 D.A. 2098–2099, 2142–2143, 2225, 2246–2247).

[6] Campbell testified that Parks also came to Louisville from Nashville "once or twice" during the time Campbell spent in Louisville (5 D.A. 2241).

that he was "relaxing" and not doing any work while in Louisville (2 D.A. 840).

Petitioner Parks approached James T. Walker, a Negro Nashville police officer, shortly after the Test-Fleet trial began and asked him whether he knew Gratin Fields, a Negro juror in the Test-Fleet trial (2 D.A. 620). Parks asked Walker whether Fields needed money and said that "the big boys wanted to talk to" Fields and that "they needed one other to hang the jury or for a mistrial" (2 D.A. 620, 622–623). Parks said that if Fields could be reached, "they would be willing to pay up to at least $10,000 to talk to him" (2 D.A. 647). Walker thereafter arranged a meeting for Parks with Carl Fields, a son of the juror (2 D.A. 624).

At a meeting in Parks' automobile, Parks asked Carl Fields whether he could talk to his father with regard to "voting for acquittal." Parks added, "Well, if you could talk to your father * * * it would be five thousand in it apiece for you" (2 D.A. 736–737). When Fields refused, Parks gave him five twenty-dollar bills and said that if Fields could tell him before nine o'clock that evening what kind of suit or coat his father would be wearing to court the next day, he would receive another hundred dollars (2 D.A. 737). Parks explained that this information was needed by nine o'clock because "he had to make a call to Louisville" before that time (2 D.A. 740). Later that evening Carl Fields called Parks and reported that he had decided not to speak with his father about this

matter. Fields offered to return the money, but Parks told him to keep it (2 D.A. 741–742).[1]

On November 7, in Nashville, Partin spoke to Hoffa and expressed his concern over the progress of the trial. Hoffa responded, "Well, don't worry about it too much. Because I have got the colored male juror in my hip pocket. One of my business agents Campbell came into Nashville prior to the trial and took care of it." Hoffa then told Partin that Campbell was related to the juror; that the juror would not take any money, but would not "go against his own people"; and that the juror was an old retired railroad worker who "[s]at and fished" all day. Hoffa concluded, "[I]t looks like our best bet is a hung jury unless we can get to the foreman of the jury. If they have a hung jury, it will be the same as acquittal because they will never try the case again" (3 D.A. 1391–1394).

4. Utilizing the information given them by Partin, government counsel moved on December 6 and December 20, 1962, to excuse Mrs. Paschal and Mr. Fields from the jury (2 D.A. 589). Both jurors were excused after hearings which were closed to the public. With respect to the Fields motion, the government submitted, in sealed form, an affidavit signed by Partin relating the remarks made to him by Hoffa on November 7 (3 D.A. 1469–1476; Exhibits 108, 109, 110). The Test-Fleet trial terminated on December 23, 1962, with the jury unable to agree on a verdict (2 D.A. 589, 591).

[1] After this unsuccessful effort Parks attempted to communicate with the juror's daughter through Walker (2 D.A. 629–630). The daughter refused to cooperate with Walker (2 D.A. 773–777).

ARGUMENT

The court of appeals observed that in the course of this sharply contested six-and-a-half-week trial "[a]lmost every question which the ingenuity of counsel could think of, was raised in the trial court" (Hoffa Pet. App. 3a).[8] This multitude of issues was presented to the court of appeals, which carefully considered petitioners' arguments *seriatim* in an exhaustive opinion and held unanimously that each of the contentions made was unsound. Indeed, the only errors found by the court of appeals were instances in which the district court had erred favorably to the

[8] Extensive pretrial proceedings were held on twelve issues raised by petitioners' pretrial motions for dismissal, change of venue, severance, and various discovery requests (1 D.A. 3–10, 71–147, 367–440). After the district court acted on these motions, petitioners sought a writ of mandamus in the court of appeals to direct the district court to dismiss the indictment or to transfer the case. The request was denied, 323 F. 2d 178, and a petition for a writ of certiorari was denied by this Court, 375 U.S. 907. Petitioners thereafter sought to disqualify the district judge. That motion was denied, but the judge voluntarily recused himself (G.A. 312–318). Thereafter, petitions for rehearing of the motions to dismiss and for severance were filed, and a full-day hearing was held (1 D.A. 17–21). After the conclusion of the trial, petitioners filed motions for a new trial asserting 91 grounds (1 D.A. 286–305). These were denied by the court with a full opinion (1 D.A. 327–366).

On December 18, 1964, petitioners filed a second motion for a new trial charging government misconduct. The motion was denied and is now pending on appeal to the Court of Appeals for the Sixth Circuit.

On September 1, 1965, petitioners filed a third motion for a new trial in which they charged the district judge, jury and deputy marshals with misconduct during the trial and moved to disqualify the judge. Those motions were denied on November 24, 1965, and are pending on appeal.

defense—in one case resulting in the unwarranted dismissal of count 2 of the indictment (Hoffa Pet. App. 31a; see also *id.* at 33a). We submit that the many issues once again tendered by petitioners do not warrant further review by this Court. None involves an important or recurring question of law; none concerns an issue on which there is a conflict of decisions among courts of appeals; and each of the claims was correctly rejected by the district court and by the court of appeals.

I. PARTIN'S TESTIMONY

1. Petitioner Hoffa's initial contention—that the evidence on which he was convicted was obtained by "the planting of a secret informer" in his councils during the Test-Fleet trial (Hoffa Pet. 46-52)—rests on the erroneous factual assumption that an informer was "planted."[9]

After conducting a full hearing, during which petitioners were permitted to call witnesses and to cross-examine Partin and Walter J. Sheridan, the government agent to whom Partin reported his information, the district court found expressly that the government was not responsible for Partin's presence

[9] Petitioner Hoffa mistakenly asserts, in this regard, that Partin "[a]dmittedly * * * attended the Test Fleet trial for the purpose of spying on petitioner for the Government * * *" (Hoffa Pet. 46). The district court found that Partin "remained in Nashville or returned to Nashville either at the request or with the consent of the defendant Hoffa and not at the instruction of the Government" (1 D.A. 351). The court of appeals said, "Partin was in and out of Nashville a number of times during the trial, looking after his own business" (Hoffa Pet. App. 23a).

in Nashville, that government agents neither requested nor instructed him to remain there, and that the government, upon learning of his intention to go to Nashville, had requested *only* that he disclose to Sheridan any indication of jury tampering or other unlawful activity (1 D.A. 351; 3 D.A. 1346-1347). Upon summarizing the evidence pertaining to Partin's initial communications with government agents and the circumstances of his trips to Nashville, the court of appeals sustained the district court's factual findings as supported by substantial evidence (Hoffa Pet. App. 21a-23a). There is no reason for this Court to subject this factual issue to further review. See note 4, *supra*.

Moreover, even assuming that the facts were as petitioners erroneously assert them to be, their legal contentions are unsound. Partin's testimony in this case had nothing to do with defense strategy in the Test-Fleet trial; the statements relevant to the instant charges made by petitioners Hoffa and King to Partin were not uttered in the presence of attorneys or in the course of strategy conferences. Whatever may be the outer reach of Sixth Amendment protection, it surely does not extend, as petitioners' contention would have it, to every remark, unrelated to trial strategy, made by a defendant on trial to a trusted confidant. Consequently, even if, as petitioners contend, the Sixth Amendment secures against government interference not only conversations between a criminal defendant and his attorneys but also the personal thoughts of the defendant "concerning the defense of the case"

(Hoffa Pet. 47), no fruit of any violation of that constitutional protection was used in this case by the government.

Finally, if there had been any violation of Sixth Amendment rights in the Test-Fleet trial, the appropriate remedy under the decisions relied upon by petitioners would have been to vacate any conviction obtained pursuant to that trial and to conduct "a new trial at which the accused can be free of surreptitious interception." *Coplon* v. *United States,* 191 F. 2d 749, 760 (C.A.D.C.), certiorari denied, 342 U.S. 926; *Caldwell* v. *United States,* 205 F. 2d 879, 881, n. 11 (C.A.D.C.). No decision has yet suggested that it is necessary to fashion an exclusionary rule to deal with government interference into trial strategy, much less to exclude pursuant to such a rule evidence pertaining to the commission of an independent offense in which the defendant engaged while he was standing trial.

2. Nor is there any merit to the claim that Hoffa's and King's admissions to Partin infringed upon their Sixth Amendment rights under *Massiah* v. *United States,* 377 U.S. 201, and *Escobedo* v. *Illinois,* 378 U.S. 478 (Hoffa Pet. 49–50; King Pet. 23–29). Those decisions do not entitle a person to the assistance of counsel while he is engaged in committing an offense, even if a government informant or the agent to whom he is reporting has focused attention on that individual and suspects him of planning a crime. See *United States* v. *Winter,* 348 F. 2d 204 (C.A. 2), certiorari denied December 13, 1965, No. 503, O.T. 1965; *Vinyard* v. *United States,* 335 F. 2d 176 (C.A. 8), certiorari

denied, 379 U.S. 930. *Massiah* and *Escobedo* plainly relate to government endeavors to obtain admissions regarding *past* offenses, even if, as petitioners contend, they restrict the admissibility of admissions made prior to arrest and indictment.

3. The claim that the Fourth Amendment was violated by Partin's allegedly deceptive and fraudulent entry into petitioner's living quarters (Hoffa Pet. 51; King Pet. 29–31) is wholly without merit. The same contention was squarely rejected by this Court in *Lopez* v. *United States*, 373 U.S. 427, 438, and nothing was said by way of either holding or *dictum* in *Caldwell* v. *United States*, 205 F. 2d 879, 881 (C.A.D.C.)—which petitioner Hoffa cites as presenting a conflict with the decision below—to support petitioners' argument.

II. PRETRIAL MATTERS

1. With respect to the selection and impanelment of the grand jury, petitioner Hoffa contends (1) that the suggester system of obtaining names of prospective jurors, as administered in the Middle District of Tennessee, is invalid; (2) that the district court refused to permit petitioner to examine the suggesters in open court to determine whether they were prejudiced against cognizable segments of the community; and (3) that the district court failed to conduct an adequate *voir dire* of the prospective grand jurors (Hoffa Pet. 70–76). Each of the claims is unsound.

a. The validity of the suggester system, as such, was authoritatively sustained by this Court in *Scales* v. *United States*, 367 U.S. 203, 259. Petitioner's claim

here is that the jury commissioner and clerk improperly delegated their statutory duties to the suggesters in that they did not inspect the names of the prospective jurors or ask them to complete questionnaires to determine their qualifications. The claim of improper delegation has no factual support.

First, the clerk and jury commissioner transmitted their requests for names to the suggesters in letters which set forth in detail the qualifications required of prospective jurors (1 D.A. 162–163). Second, both the jury commissioner and clerk stated in their depositions that they received the lists of names submitted, that they individually added names of qualified persons, and that they then personally drew up the list which was placed in the jury box (1 D.A. 161, 165). Finally, although they did not themselves review the qualifications of each juror, they knew many of them personally and knew from experience that the suggesters submitted names of qualified jurors (*ibid.*). The claim of delegation is totally unsound when, as here, the jury commission was in complete control of the process, it assigned subsidiary functions only under detailed instructions, and it relied on the results only after experience had shown that those to whom the duties were assigned had acted responsibly. Nothing in *Wilson* v. *United States*, 104 F. 2d 81 (C.A. 5), certiorari denied, 308 U.S. 574, is to the contrary. In that case it was claimed that a jury questionnaire had been prejudicial. The court held that it was proper for the commission to issue a questionnaire because it was under a duty "to make

inquiry" before placing the names of jurors in the box. It did not hold that questionnaires were required or that any particular method of insuring that qualified jurors were placed in the box was prescribed.

b. The district court properly held that petitioner would have obtained "at best a wholesale open court discovery proceeding, at worst an inquisition" (1 D.A. 177) had he been permitted to examine in open court the 77 suggesters whom he subpoenaed for the pre-trial hearing, but as to whose anticipated testimony he could make no representation to the court. Petitioner's counsel had acknowledged that he had talked with only one of the suggesters and did not even state what that suggester had told him. Petitioner's bare surmise that the suggesters had not followed instructions or had acted in a prejudicial manner did not entitle him to put them all on the stand without even interviewing them to determine how they would testify. *Windom* v. *United States*, 260 F. 2d 384, 385 (C.A. 10); *Poliafico* v. *United States*, 237 F. 2d 97, 110 (C.A. 6), certiorari denied, 352 U.S. 1025. Petitioner's allegation did not amount to the "distinct evidence" required to justify a complete investigation of the sort requested. *Glasser* v. *United States*, 315 U.S. 60, 87; *Frazier* v. *United States*, 335 U.S. 497, 503; cf. *Lawn* v. *United States*, 355 U.S. 339, 348–349.

In any event, subsequent events demonstrated that the refusal to permit the examination of the suggesters did not foreclose the defendants with respect to any matter on which they were entitled to examine them. Nearly five months after the pre-trial hearing,

petitioner Campbell submitted a motion for rehearing (adopted by petitioner Hoffa) to which were attached affidavits by three investigators who had interviewed the suggesters and concluded that many of them were prejudiced against Negroes (G.A. 319–339). The government pointed out in response that the same affidavits had been submitted in related cases involving indictments returned by the same grand jury and that, in those cases, the investigators had been cross-examined by government counsel (G.A. 340–349). That cross-examination was made a part of the record in this case (G.A. 5–45, 343–344). It disclosed that the investigators were told by suggesters who, the investigators said, displayed personal prejudices against Negroes that any such prejudice played no part in the performance of their functions, and that most of the suggesters did, in fact, submit names of Negroes to the jury commission (G.A. 21, 27, 29, 41–42).[16] Consequently, it is quite clear that if petitioner had been given the opportunity to conduct the requested investigation in open court notwithstanding the inadequate showing made and the delay it would have caused, he would have been unable to prove his allegations.

c. Petitioner's claim regarding the *voir dire* of the grand jury is essentially that the district judge should have named petitioner Hoffa and inquired of the

[16] The investigators interviewed no suggesters in Davidson County, in which more than 61% of the nonwhite population over the age of 21 in the judicial district resided and where several Negroes served as suggesters (G.A. 346), but limited their activities to other counties in the district, where only 8% of the total population over 21 is nonwhite.

prospective jurors whether they had any predisposition against him. In his memorandum explaining the denial of petitioner's pre-trial motions the judge explained that he believed that it was better not to name any potential defendant so as not to add "fuel to the flames" (1 D.A. 182, quoting from *Beck* v. *Washington*, 369 U.S. 541, 548). This was, we submit, the wiser course. It was not then known whether petitioner Hoffa would be indicted, and to single him out by name might have been more prejudicial than the judge's general inquiry—after a reference to a "highly publicized criminal case recently tried before the chief judge of this court" (1 D.A. 204)—whether the jurors had seen or heard anything which would prevent them from taking the grand jurors' oath (1 D.A. 206–207).

Both the *voir dire* and the charge to the grand jury went well beyond what this Court deemed adequate in *Beck* v. *Washington*, 369 U.S. 541. The court here instructed at the outset that information gained outside the grand jury room was not to be considered "in arriving at [a] decision whether or not to vote for a true bill" and that a person could not serve as a juror unless he could honestly say that he would act in the grand jury room "only on the evidence heard by you in the grand jury room" (1 D.A. 205). In the course of the *voir dire* the prospective jurors were asked whether they could "disregard any reports or rumors that you may have heard and act only on the evidence that is presented to you in the grand jury room" (1 D.A. 207). And again after the jury was sworn,

the judge instructed that "[n]ewspaper stories, radio and television broadcasts, rumors, conversations with friends or acquaintances—these are not evidence and must be disregarded entirely in voting on an indictment" (1 D.A. 212).

2. Petitioner Hoffa also contends that his indictment was invalid because it rested entirely upon hearsay evidence—*i.e.*, a government agent's testimony regarding the reports made to him by Edward G. Partin (Hoffa Pet. 76–78). Recognizing that this Court held squarely in *Costello* v. *United States*, 350 U.S. 359, that this kind of evidence is sufficient to support an indictment, petitioner contends that the fact that Partin was subpoenaed to testify before the grand jury and invoked a privilege against self-incrimination distinguishes this case from *Costello*. The argument, however, misapprehends the nature and purpose of a grand jury indictment. The grand jury's function is to determine whether probable cause exists to believe that an offense has been committed, not to speculate whether the government will have the witnesses available at trial to win a conviction. Whether a key witness invokes a testimonial privilege is no more a concern of the grand jury than whether a witness is critically ill or may otherwise be unavailable to testify at the time of trial. The grand jury's protective function is fully performed when it determines from the evidence before it—including hearsay testimony—whether there is probable cause to charge a defendant. That is what the grand jury did in this case.

3. Petitioner Campbell's claim that the indictment was invalid under *Russell* v. *United States*, 369 U.S. 749, because it did not specify in what manner he aided and abetted the commission of the offense charged in count 3 (Campbell Pet. 22–25) is totally unsound. The allegation that Campbell was an aider and abettor was itself surplusage; petitioner could have been charged as a principal and convicted on proof of aiding and abetting. *Nye and Nissen* v. *United States*, 336 U.S. 613; *United States* v. *Schaffer*, 291 F. 2d 689, 693 (C.A. 7), certiorari denied, 368 U.S. 915; *United States* v. *Washington*, 287 F. 2d 819 (C.A. 7), certiorari denied, 366 U.S. 969. And since the principal offense was described with great specificity,[11] petitioner knew precisely with what substantive offense he was being charged. There was no requirement that the form which his assistance took be described in the indictment. *United States* v. *Simmons*, 96 U.S. 360, 363; *Coffin* v. *United States*, 156 U.S. 432; *Ellis* v. *United States*, 321 F. 2d 931, 932 (C.A. 9); *Barone* v. *United States*, 205 F. 2d 909 (C.A. 8).

[11] Count 3 alleged that Parks, aided and abetted by Hoffa and Campbell, knowingly endeavored to influence Gratin Fields, known by them to be serving as a petit juror in the Nashville trial, in that "Thomas Ewing Parks did meet with Carl Fields, a son of Gratin Fields, and did offer and promise to Carl Fields a sum of money, that is to say five thousand dollars for himself and five thousand dollars to be paid to Gratin Fields, for the purpose of causing Carl Fields to influence Gratin Fields to vote for the acquittal of James R. Hoffa in the said case" (1 D.A. 69–70).

4. Petitioner Parks contends that he was entitled to be tried separately from his codefendants on the ground that "the severance of the conspiracy count before trial destroyed any basis for joint trial of the separate substantive offenses" (Parks Pet. 14). This claim rests on a misunderstanding of the basis on which the various substantive counts in the indictment were joined. Count 1—the conspiracy count—named only petitioner Hoffa as a defendant, and it was not, as in a usual conspiracy case, the vehicle for joining substantive offenses committed pursuant to the conspiracy and defendants engaged in committing them. Compare *Schaffer* v. *United States*, 362 U.S. 511. The defendants named in counts 2, 3, 4 and 5 were joined on the theory, sustained by the district court (1 D.A. 200–201) and the court of appeals (Hoffa Pet. App. 35a), that whether or not they committed offenses pursuant to a single unlawful conspiracy, the defendants were charged with having participated "in the same series of acts or transactions constituting an offense or offenses." Rule 8(b), Federal Rules of Criminal Procedure.[12] This rule has never been read to limit joinder of defendants to cases in which the defendants act pursuant to a single conspiracy. It is enough, even in the absence of any conspiracy charge, if they were "engaged in a connected course of conduct out of which arose separate crimes charged

[12] This rule also provides that "Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The joinder of counts was clearly permissible under Rule 8(a) because they were "of the same or similar character."

against different persons" (*Kivette* v. *United States*, 230 F. 2d 749, 753 (C.A. 5), certiorari denied, 355 U.S. 935), or if they participated in "a series of factually related transactions" (*Williamson* v. *United States*, 310 F. 2d 192, 197, n. 16 (C.A. 9)), or if the record shows "a clearly discernible pattern of action" (*United States* v. *Rosenfeld*, 235 F. 2d 544 (C.A. 7), certiorari denied, 352 U.S. 928).[13] Indeed, the dissenting opinion in *Schaffer* v. *United States*, *supra*, on which petitioner relies, recognized that joinder of defendants is permissible even if the proof does not establish a conspiracy so long as there is "a nexus between the several transactions" whereby "what each [defendant] does is connected up with the others or has some relation to them." 362 U.S. at 521–522.

The "connection" or "factual relation" here is apparent from the face of the indictment. The endeavors alleged were patently similar in form and purpose—all were efforts made jointly by Hoffa and one or more others to influence petit jurors in the Test-Fleet trial. All the offenses were committed within the same general period of time and in the same location, and all involved the participation of petitioner Hoffa as a central figure. The plain inference from the face of the indictment is that all the corrupt endeavors to influence jurors which were alleged shared a single objective: to insure that Hoffa's trial would not result in a verdict of guilty. These factors were

[13] See also *Cataneo* v. *United States*, 167 F. 2d 820, 823 (C.A. 4); *Wiley* v. *United States*, 277 F. 2d 820 (C.A. 4); *Kleven* v. *United States*, 240 F. 2d 270 (C.A. 8); *Scheve* v. *United States*, 184 F. 2d 695 (C.A.D.C.).

more than adequate to justify joinder of the defendants under Rule 8(b). See *Cataneo* v. *United States, supra; United States* v. *Rosenfeld, supra.*[14]

Nor was petitioner Parks entitled to severance under Rule 14. Petitioner cites no specific item of evidence pertaining to other counts which unfairly prejudiced him in his defense on count 3, and, indeed, there was none. The government's proof was compartmentalized as to counts, and no admissions introduced as to any other count expressly or impliedly reflected on petitioner's guilt on the count in which he was charged.[15] The most striking evidence of the fact that the jury properly considered each defendant and each count separately was its acquittal of the defendants charged in count 4. *United States* v. *Kelly*, 349 F. 2d 720 (C.A. 2), on which petitioner relies, involved the introduction of codefendants' post-conspiracy statements which were inadmissible against the defendant who was explicitly and repeatedly "ex-

[14] Neither *McElroy* v. *United States*, 164 U.S. 76, nor *Kotteakos* v. *United States*, 328 U.S. 750, is apposite. In *McElroy*, this Court observed that there was "no connection" between offenses which had been charged together—that they were, in fact, "substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence." 164 U.S. at 79–80. In *Kotteakos*, the issue was whether "separate and distinct" conspiracies could be tried together "when the *only* nexus among them lies in the fact that one man participated in all." 328 U.S. at 773 [emphasis added].

[15] Evidence of petitioner Hoffa's statements pertaining to other counts was, of course, admissible to prove intent even as to counts not specifically referred to in such statements.

coriated" therein for having made false representations. 349 F. 2d at 758. No such admission or other prejudicial testimony was involved here.[16]

5. The district court did not err in refusing to conduct an inquiry into the composition and method of selection of petit jury panels in the Eastern District of Tennessee in response to a motion made on the first day of trial (Campbell Pet. 20–22). This Court held in *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 362, and in *Frazier* v. *United States,* 335 U.S. 497, 503, that a challenge to the petit jury is governed by the provision of Rule 12(b)(2) of the Federal Rules of Criminal Procedure which requires certain defenses and objections to be made "only by motion before trial." In denying defendants' requests to call

[16] Petitioner also complains generally of the district court's conspiracy instructions. But it was entirely proper for the judge to charge the jury regarding conspirators' declarations since, even as to each separate count, statements were made by one or more of the accused pursuant to the unlawful venture charged in that count. The court never instructed the jury specifically that it might consider declarations made pursuant to count 5, for example, against defendants named in count 3, and there is no reason to believe that the jury would have so considered the evidence since the proof was distinctly compartmentalized. Nor is there merit to the claim that petitioner Parks was deprived of a right of cross-examination because he was not permitted to interrogate Partin with regard to the reported plot to assassinate Attorney General Kennedy (Parks Pet. 10–11). The assassination plot was a collateral matter and the district court refused to allow the cross-examination not only because other defendants objected but because the subject was not material to the charges in the indictment (3 D.A. 1550).

the clerk of the court and jury commissioner, the district judge observed (2 D.A. 471):

> This case was transferred to this district on December 28th, 1963, and set for trial at that time upon this date, January the 20th. Since that time, as reflected by the motions themselves, no party has attempted to ascertain any facts with regard to the method of drawing the jury. No party has, in his motion, indicated any facts that would indicate an unfair drawing, an improper drawing of the jury.
>
> The Jury Commissioners were available, subject to being inquired of by any counsel that sought to do so. * * *
>
> The parties have had almost a month in which to inquire into these matters and yet they have elected to wait until the morning of trial to file any motion and have filed nothing in support of the motion that would justify or warrant the Court in opening up the case and delaying any trial on that basis.

In this case, as in *Shotwell, supra*, at 363, "the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. * * * Inquiry as to the system employed could have been made at any time." The fact that the full names and addresses of the 200 veniremen drawn as a panel for this case were not released until the day of trial [17] does

[17] The names had been publicly drawn on January 9, 1964, eleven days before the date set for trial, in the presence of, *inter alia*, government counsel and counsel for at least one of the defendants (1 D.A. 316). Pursuant to the court's instructions, the clerk announced the last name and first initial of each person as his name was drawn, but the veniremen's full

not further petitioners' claim since the issue raised by the defense motions did not turn at all on the makeup of that particular panel. The relevant inquiry was not the composition of the 200-member panel but the *system* used to obtain names for deposit in the jury box from which the panel was drawn. The district court's refusal—for good and sound reasons [18]—to publish earlier the names, addresses and occupations of jurors on the panel did not affect petitioners' ability to make the necessary inquiries of the responsible officials.

6. The short answer to petitioner Hoffa's claim that he was deprived of a fair trial by reason of prejudicial publicity (Hoffa Pet. 53–60) is that the district court took every available precaution, short of an indefinite continuance of the trial, to eliminate even a suspicion that publicity could affect the jury's verdict. Petitioners' pretrial motions for a transfer of the trial were granted even though it meant that one codefendant, who had not joined in those motions, had to be tried separately (1 D.A. 214–218).[19] And

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names, addresses, and occupations were not made available to counsel for either side until the morning the trial commenced (see 1 D.A. 221, 222, 223).

[18] In light of the charges on which the defendants were about to stand trial—which indicated that they had been involved in various efforts to corrupt an earlier federal jury, including a bribe offer made while that jury was being impaneled—the court's precautions with respect to the drawing of the names on January 9 (see note 17, *supra*) were reasonable.

[19] District Judge Wilson, who was assigned the case after District Judge Gray had recused himself (G.A. 312–318), also granted a two-week continuance from January 6 to January 20, 1964, shortly after the case was assigned to him (1 D.A. 215, 218).

after the case was transferred from Nashville to Chattanooga, neither petitioner Hoffa nor any codefendant sought a further change of venue. The only additional relief requested was an indefinite continuance, and the motion seeking such a delay was filed one week before the trial was scheduled to begin in Chattanooga (1 D.A. 218–220).

The district court examined the evidence of publicity in Chattanooga and properly denied the requested continuance. In an opinion explaining the reasons for his action, the judge noted that prior to transfer of the case to Chattanooga, the proceedings in the case had been given only summary treatment on inside pages of the Chattanooga newspapers, and that the local newspapers since the transfer had confined themselves to objective reporting of pretrial procedures and trial preparations. The judge also observed that much of the cited publicity "consisted of statements made on behalf of the defendant by his own counsel" (1 D.A. 225–226). The lapse of two months between the disbarment of Hoffa's attorney (which was reported on the front page of the *Chattanooga Times* of November 21 and 22, 1963) and the commencement of the trial was sufficient to dissipate any alleged prejudice arising out of that incident. The publicity in Chattanooga in this regard was far less extensive than that in Nashville, which was the attorney's home town. Under these circumstances, it was entirely proper for the court to deny the motion to postpone a trial which had already been delayed for several months by an attempted interlocutory review proceeding pursued by

petitioner Hoffa to this Court. See *Hoffa v. Gray*, 323 F. 2d 178 (C.A. 6), certiorari denied, 375 U.S. 907.

Moreover, the *voir dire* of prospective petit jurors lent no support to petitioners' claim that they were "bathed in the stream of prejudicial publicity" (Hoffa Pet. 24). Although the jurors admitted having read or heard of petitioner Hoffa, the overwhelming percentage of prospective jurors knew very little, if anything, about the charges involved in the indictment (*e.g.*, 2 D.A. 492, 517, 531-532, 537, 541). The *voir dire* consumed more than five trial days, and each prospective juror was separately and searchingly interrogated. The court initially permitted counsel to question jurors but thereafter conducted the interrogation itself. Challenges for cause were liberally sustained. On this record, we believe the claim that the jury was prejudiced against petitioners is wholly unwarranted.

Petitioner's contention really amounts, in our view, to the argument that a notorious public figure who has been criticized in media of mass communication may never be tried on a criminal charge. This claim is obviously unsound. The fact that petitioner Hoffa was widely known did not immunize him from criminal prosecution under appropriate safeguards. Adequate safeguards were taken here: A change of venue was granted; the trial was further delayed for two weeks; an extensive *voir dire* was conducted; the jury was sequestered during trial; and the jurors were repeatedly instructed not to discuss the case among themselves until the time came for their deliberations. All

these features distinguish this case from *Sheppard* v. *Maxwell*, 346 F. 2d 707 (C.A. 6), certiorari granted, November 15, 1965, No. 490, this Term. See the dissenting opinion in *Sheppard*, 346 F. 2d at 738–740.

Nor is *Marshall* v. *United States*, 360 U.S. 310, on which petitioner relies, apposite. In *Marshall*, information which could not have been offered as evidence by the prosecution reached the jurors *during trial* by means of newspaper reports. The sequestered jury in this case saw no matter pertaining to the trial, nor was it suggested that any newspaper report containing such information reached any juror so close to the time of trial as to affect his verdict.[20]

There is no merit to petitioner's additional claim that the assignment of a large number of marshals to guard the jury contributed to prejudice caused by unfavorable publicity (Hoffa Pet. 60). The deputy marshals who were in attendance in court were unobtrusive—they were not in uniform and they displayed no weapons (1 D.A. 331; 2 D.A. 447). Moreover, once the jury was selected, the court directed that not more than four marshals be in attendance on the jury at any one time (2 D.A. 571). Marshals were, of course, needed to attend the sequestered jury. Whenever, as in this case, 16 persons (12 regular jurors and 4 alternates) must be kept together for an extended

[20] The summary of two indictments filed against petitioner Hoffa and the review of criminal actions against him contained in Department of Justice press releases (Hoffa Pet. App. 71a–82a) cannot be deemed to have affected the fairness of this trial since they were issued more than seven months before the trial.

period, a substantial staff is a practical necessity to tend to individual needs and requirements."[21]

Finally, it was the defendants themselves who directed the jury's attention to the number of marshals and suggested to the jury that this reflected on the likelihood that "Mr. Hoffa or any of these defendants would try to tamper with you if you are chosen as a juror" (2 D.A. 504; see also 2 D.A. 486).

III. TRIAL RULINGS

1. With respect to the claim that evidence of what Judge Miller had told counsel and Hoffa during the Test-Fleet trial regarding a juror's report that he had been offered a bribe was erroneously admitted (see p. 7, *supra*), the court of appeals held that the error had been favorable to petitioners because the juror should have been permitted to testify personally regarding the bribe offer (Hoffa Pet. App. 30a–31a).[22] The court also held that the evidence was primarily admitted for purposes of corroboration (Hoffa Pet. App. 31a). These rulings do not warrant further

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[21] Petitioner asserts that 59 marshals participated "at one time or another" in this trial (Hoffa Pet. 27). Since marshals from other locations were assigned to duty in the area for one or two-week periods, the total figure of those participating in the seven-week trial is not an accurate reflection of the number in service at any one time.

[22] This evidence related directly to count 2, on which Hoffa was acquitted at the close of the government's case. This resulted from trial judge's ruling that since Medlin, Hoffa's codefendant in this count, had been severed, the juror could testify only that he had a conversation with Medlin and not to the statements Medlin made to him (4 D.A. 1904, 1905, 1915, 1916, 1934, 1942–1944).

review on any of the four grounds asserted by petitioner Hoffa (Hoffa Pet. 65–69).

a. No "exception to the Sixth Amendment right of confrontation and cross-examination" (Hoffa Pet. 66) would have been involved if the juror had personally testified. The gist of the offense charged in count 2 was the bribe offer, and petitioner Hoffa would have been able to cross-examine the witness as to the commission of that offense if, over petitioner's objection, the juror had been permitted to testify what his neighbor, Medlin, who offered the bribe, had said. *United States* v. *Browne*, 225 F. 2d 751 (C.A. 7), does not stand for any contrary rule. In that case the prosecution sought to use the principal's *plea of guilty* as establishing the commission of the offense in the trial of the aider-and-abettor, and the court of appeals held that it could not thereby deprive the accused of the right to confront and cross-examine the witnesses to the commission of the offense. Petitioner Hoffa in this case would clearly have had that opportunity if the juror had been allowed to testify as to the offer of a bribe; and unlike the defendant in *Browne*, he would not have been "precluded from denying" that the offense was committed. 225 F. 2d at 754.

b. Since the reason that petitioner could not cross-examine the juror who had reported the bribe offer to Judge Miller was that petitioner had successfully objected to his testimony as to the offer (C.A. 128–145; 4 D.A. 1904–1952), petitioner is hardly in a position to contend that he was deprived, under *Pointer* v. *Texas*, 380 U.S. 400, of the right of cross-examina-

tion. Moreover, the transcript of Judge Miller's discussion with counsel was introduced, under the district court's ruling, not to prove that a bribe offer had been made but only to corroborate Partin's testimony regarding statements made by Hoffa. For this purpose it was not double hearsay; indeed, it was not hearsay at all. It properly established that between the time Hoffa said to Partin that he wanted him "to pass something" and the occasion on which he said, "the dirty bastards [*sic*] went in and told the Judge that his neighbor had offered him $10,000. We are going to have to lay low for a few days"[1] (see pp. 6–7, *supra*), Hoffa had been told of a bribe offer by Judge Miller. The fact that he had been so advised, not the truth of what he was told, was admissible to corroborate Partin's testimony that the statements he attributed to Hoffa had, in fact, been made. And the evidence was admitted with an appropriate limiting instruction telling the jury that it was to be considered only as it "may or may not tend to corroborate" Partin's testimony (4 D.A. 1962–1963).

c. Whether or not this evidence was too prejudicial to be admitted was a question which, under established principles, was committed to the sound discretion of the district court. *E.g., Selgado* v. *United States*, 278 F. 2d 830, 832 (C.A. 1); *Harvey* v. *United States*, 23 F. 2d 561, 566 (C.A. 2). Neither *Hale* v. *United States*, 25 F. 2d 430 (C.A. 8), nor *Marko* v. *United States*, 314 F. 2d 595 (C.A. 5), both of which involved evidence directly implicating the defendant in the commission of another criminal offense, are in

conflict with this case. The evidence here may have suggested to the jury that a bribe was offered but it did not specify petitioner Hoffa or any codefendant on trial as a principal or accessory to the commission of that offense."

d. The transcript of Judge Miller's comments was not admitted to establish the commission of the offense charged in count 2, but only insofar as it might or might not corroborate Partin with regard to statements made by Hoffa manifesting his intent to commit the offenses charged in the other counts. Hence this case does not raise the question "whether evidence of a crime upon which a defendant has been acquitted (the Count Two line of evidence here) can be retained in evidence for any purpose after such acquittal and in aid of his conviction for other and related crimes (Counts Three and Five here)" (Hoffa Pet. 69).

2. The district court's instructions regarding extrajudicial declarations by persons joining with the defendants in an unlawful scheme were entirely proper. The fact that the court framed the instruction in terms of "conspiracy" notwithstanding the severance of the conspiracy count was not error. Petitioner's claim in this regard (Hoffa Pet. 78–80) "overlooks the fact that joint participants in a crime may be denominated

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"There is no merit to the claim that the transcript reflected a "judicial finding" that there had been an attempt to tamper with the juror. The trial judge carefully excised any conclusion of Judge Miller from the portion read to the jury. The jury heard only what Judge Miller reported in the presence of Hoffa and counsel that the juror had said (4 D.A. 1963–1964).

'conspirators' and the joint act or scheme may be called a 'conspiracy' since such words do not lose all of their ordinary content merely because Congress has separately created a crime of conspiracy." *Kumpe* v. *United States,* 250 F. 2d 125, 126 (C.A. 5).

Nor is there any basis for petitioner's assertion that the court failed to make a preliminary determination of the existence of evidence *aliunde* hearsay declarations before deciding whether to admit declarations of co-conspirators against the defendants. That the court was making these determinations as the evidence was presented is obvious from its rejection of the testimony of the juror discussed at pp. 33–36, *supra,* on the ground that "the present state of the record" did not sustain its admission (G.A. 128). The court of appeals, reviewing the evidence, held that "there was sufficient evidence to make out a prima facie case linking [petitioners] with the conspiracy" (Hoffa Pet. App. 33a). It was proper for the district court, having made the necessary preliminary finding, to submit this issue to the jury for a second look. *United States* v. *Dorsey,* 290 F. 2d 893 (C.A. 6), certiorari denied, 368 U.S. 825; *Continental Baking Co.* v. *United States,* 281 F. 2d 137, 150–153 (C.A. 6). Moreover, petitioners cite no specific declarations as having been erroneously admitted for lack of evidence *aliunde.* Consequently, there is no occasion for this Court to review the general question whether a preliminary determination was made by the district court.

3. a. Petitioner King's claim that the cross-examination of government witness Partin was improperly

curtailed and that impeaching matter was erroneously excluded (King Pet. 36–39) is plainly refuted by the record. Partin underwent cross-examination for a full week—from Thursday, February 6, to Wednesday, February 12, 1964—and the district court permitted the defense considerable latitude during this extended cross-examination, extending well beyond matters which are ordinarily deemed impeaching (see, *e.g.*, 3 D.A. 1513, 1533; G.A. 80). The court did not abuse its discretion in refusing to allow cross-examination on many collateral issues, such as the reported plot to assassinate Attorney General Kennedy,[24] which would merely have delayed and burdened the trial. *Lohman* v. *United States*, 266 F. 2d 3, 4 (C.A. 6), certiorari denied, 361 U.S. 923; *Bateman* v. *United States*, 212 F. 2d 61, 67 (C.A. 9).

b. The court's exclusion of the testimony of proffered witnesses Reynolds and Fox (which was not claimed as error in the court of appeals, see *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *Husty* v. *United States*, 282 U.S. 694, 701–702) was similarly a proper exercise of discretion to avoid detours into collateral issues. Reynolds' offered testimony related to statements allegedly made by Partin long after the events as to which he had testified, and no foundation was laid during Partin's examination for this impeaching proof. Fox's offered testimony concerned an alleged transaction which was far removed from the issues of the case and was obviously inflammatory in nature. See King Pet. 17–19. The court permitted many

[24] The matter of the reported plot was considered outside the presence of the jury.

other defense witnesses to testify to collateral matters (*e.g.*, 5 D.A. 2502–2510, 2525–2534), but it drew the line as to these. That decision was not an abuse of discretion.[25]

c. The claim that the defense was denied an opportunity to cross-examine Partin on transcripts of recordings he had made of telephone conversations with Hoffa (King Pet. 20–21, 37–39) is contradicted by the record. The defense did *not* ask to be permitted to conduct such cross-examination. As support for the assertion that "the court refused to permit the recall of Partin for further cross-examination" (King Pet. 21), petitioner relies on an incident that occurred more than ten days before the recordings of the telephone conversations were produced for defense inspection (*i.e.*, while they were still in the possession of the court). At that time the defense sought further cross-examination "because of the state of the record now with respect to a telephone conversation and also the write tapping, which apparently now has been admitted by the government" (4 D.A. 1969). In context, that request pertained not to the *contents* of the telephone transcripts but to defense allegations

[25] Mrs. Partin's failure to testify was attributable not only to the fact that her testimony dealt with collateral matters but also to her assertion of the marital privilege. Since the purpose of the privilege is to protect marital harmony (*e.g.*, *Hawkins* v. *United States*, 358 U.S. 74, 77, 79; *Lutwak* v. *United States*, 344 U.S. 604, 615; *Bassett* v. *United States*, 137 U.S. 496, 505–506), it could be invoked by Mrs. Partin to avoid giving impeaching testimony regarding her husband even though he was not a defendant. 8 Wigmore, *Evidence*, § 2234, at 231 (McNaughton rev. 1961).

that Partin had lied when he denied having engaged in wiretapping (4 D.A. 1969–1971). After the recordings were produced, the defendants made various motions (6 D.A. 2669–2683), but did not seek to recall Partin. Instead, they introduced the transcripts themselves into evidence and argued to the jury that they were inconsistent with Partin's testimony.[26] There is, therefore, no reason for this Court to review the finding of the district court—sustained by the court of appeals (Hoffa Pet. App. 43a)—that "[t]he defendants never thereafter [*i.e.*, after the transcripts were made available] sought in any way to further examine or cross-examine the witness Partin with regard to these telephone transcriptions or calls, although Partin was present and produced in the courtroom as late as the final day of testimony before the jury" (1 D.A. 340).[27]

[26] This may well have been the wiser strategic course since the transcripts are not irreconcilable with Partin's testimony. Had he been confronted with them, he might well have explained any apparent inconsistencies.

[27] The claim that the transcripts of the recordings were statements covered by 18 U.S.C. 3500 is patently unsound. Petitioner concedes that when Partin was speaking to Hoffa on the telephone his statement was not "to an agent of the Government" but contends that when the recordings were given by Partin to government agents they came in under 18 U.S.C. 3500 (King Pet. 38). This contention has several flaws. First, the recordings, when transmitted by Partin, were not "statements"; at best, they amounted to potential physical evidence similar to a file of correspondence. Second, the recordings were not given by Partin to an agent of the federal government. They were

4. Whether or not to give a cautionary informer instruction is a matter generally left to the discretion of the district court. *Siglar* v. *United States,* 208 F. 2d 865, 867 (C.A. 5), certiorari denied, 347 U.S. 991; *Shettel* v. *United States,* 113 F. 2d 34, 36–37 (C.A.D.C.). This Court held in *Caminetti* v. *United States,* 242 U.S. 470, 495, that the failure to give such an instruction with respect to an accomplice is not reversible error. *A fortiori,* where the testimony in question is, as here, by a pretended confederate, who "is not regarded as an accomplice, not having the same motive to fabricate" (*United States* v. *Becker,* 62 F. 2d 1007, 1009 (C.A. 2) (L. Hand, J.)), it is not mandatory that a special instruction be given (see King Pet. 39).

5. Petitioner Campbell's claim that the evidence was insufficient to sustain his conviction rests principally on the assumption that proof of his participation as a conspirator in the unlawful venture charged in count 3 was insufficient to render him liable as an

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given to the administrative assistant of a Louisiana District Attorney (4 D.A. 2054). Finally, the recordings were ultimately given to the defense for their inspection. The only claim here is the factually erroneous one that cross-examination was denied; no contention is made that petitioners were prejudiced by mere delay. Indeed, government counsel submitted the transcripts here involved to the court in response to a demand that all documents which might qualify as Jencks Act statements be submitted (3 D.A. 1540–1541; 4 D.A. 1727). The court sealed what was not produced for defense inspection as Exhibit 118 (4 D.A. 1731).

aider and abettor under 18 U.S.C. 2 in the commission of that offense (Campbell Pet. 14–20). This Court held squarely to the contrary in *Pinkerton* v. *United States*, 328 U.S. 640, which was reaffirmed in *Nye and Nissen* v. *United States*, 336 U.S. 613, 618–620, on which petitioner relies. The court of appeals properly concluded that evidence of Campbell's own conduct—his visits to Louisville, his want of occupation (other than placing telephone calls) while there, the statements made by him while he was in Louisville, his chain of telephone calls to petitioner Parks, the codefendant who was immediately responsible for the bribe offers to juror Fields' family, the circumstances under which his calls were placed,[28] and his position with petitioner Hoffa's union (which created an obvious motive)—could be added to the evidence of Parks' statements to Carl Fields (see p. 11, *supra*) (admissible against Campbell under a standard exception to the hearsay rule),[29] showing that Parks' "contact was located in Louisville. The court properly concluded that this constituted circumstantial evidence from which "[t]he jury could infer that Campbell was in constant communication with the

[28] The calls to Nashville and Detroit were paid in cash while other calls made by Campbell, including calls to his home, were charged to the union's credit card (2 D.A. 857–881, 943–944). In addition, Campbell apparently arranged to *receive* calls at public pay telephones in Louisville (2 D.A. 927, 936).

[29] *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295–296; *Rogers* v. *United States*, 334 F. 2d 83, 86 (C.A. 5); *United States* v. *Annunziato*, 293 F. 2d 373, 377 (C.A. 2), certiorari denied, 368 U.S. 919; *Bryson* v. *United States*, 238 F. 2d 657, 661 (C.A. 9), certiorari denied, 355 U.S. 817; see 6 Wigmore, *Evidence* (3d ed. 1940), §§ 1714, 1725.

conspirator Parks and that Campbell reported thereon to Hoffa by way of Detroit" (Hoffa Pet. App. 42a).

Indeed, if, as its verdict demonstrates, the jury inferred from this evidence that Campbell participated in the commission of the offense, it could hardly have assumed that he was guilty of anything less than the counseling, commanding, inducing or procuring which 18 U.S.C. 2 specifically encompasses. Campbell was the obvious link between petitioner Hoffa (whose guilt was established by government witness Partin) and petitioner Parks (whose guilt was established by juror Fields' son and by Walker, who testified as government witnesses). Consequently, the jury was entitled to conclude that if Campbell participated at all, it was he who induced and procured Parks to make the improper approaches. Even absent the *Pinkerton* rule, therefore, there was sufficient evidence to sustain Campbell's conviction as an aider and abettor.

IV. ALLEGED GOVERNMENT MISCONDUCT

1. Petitioner Hoffa's allegation that government agents were engaged in surveillance of defendants and their attorneys was made several times during the trial and was consistently denied by government counsel (G.A. 51, 84; 3 D.A. 1498–1499), who also submitted affidavits detailing all "surveillance and other investigative activities" engaged in by F.B.I. agents in connection with the trial (G.A. 364–412). A hearing lasting more than two trial days was held in the district court after the close of the trial to determine the truth of the charges. After F.B.I. agents were exam-

ined by petitioners' counsel (who also testified personally regarding allegedly suspicious incidents), the court found that "the evidence wholly fails to establish any surveillance by government agents of the defendants, their attorneys, or of a single witness in the case" (1 D.A. 335–336; see also 7 D.A. 3566). The court of appeals affirmed this factual finding as "supported by substantial evidence" (Hoffa Pet. App. 28a). It noted that the flaw in petitioner's surveillance claim was that it "is not supported by the evidence" (Hoffa Pet. App. 27a).

In this Court petitioner has apparently abandoned any contention that the F.B.I. was surveilling him, his codefendants, their attorneys or defense witnesses. Petitioner's claim appears to be that the few isolated instances when the F.B.I. did engage in surveillance which was related, in some manner, to this case, created "an unsettling influence" which disrupted preparations of the defense (Hoffa Pet. 61–65). This contention is wholly without merit. The activity of F.B.I. agents during the trial was, as the record establishes, minimal.[30] Defense counsel were assured

[30] Before the trial began and during four of the five days in which a jury was being selected, F.B.I. agents observed the "public comings and goings" (G.A. 365) of four individuals who were connected with the Teamsters organization (1 D.A. 336). For purposes of identifying those who had an interest in the trial (and who "might be here for some ulterior motive"), photographs were also taken during the first days of trial of persons emerging onto the street from the Federal Building and from the Patten Hotel (7 D.A. 3259–3266). The only other surveillance of any sort was conducted between February 3 and February 6, 1964, when the F.B.I. learned that an electronic eavesdropping expert had been asked to come to Chattanooga by one of the defense counsel. In order to inves-

repeatedly that no surveillance was being conducted, and detailed affidavits were submitted in order to establish that fact. If, under the circumstances, the alleged "fear and apprehension" actually existed, it was, we submit, entirely unreasonable.

Estes v. *Texas*, 381 U.S. 532, on which petitioner relies, is plainly distinguishable. In that case the defendant was, in fact, "surveilled" by the television cameras and his knowledge of that actual surveillance constituted a form of harassment which was held to be incompatible with the constitutional standards of a fair trial. Here there was no actual surveillance; petitioner's claim rests entirely on his asserted apprehension that surveillance was being conducted.[21] Moreover, the "unsettling" effect of the alleged surveillance on a defendant is much greater when he knows that a public eye such as that of the television camera is involved than when he believes that an individual, albeit hostile, is observing his public appearances.

2. Petitioner Parks' claim that he was deprived of a fair trial by the routine destruction of an F.B.I. agent's original handwritten notes which had been in-

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tigate whether violations of Section 605 of the Federal Communications Act were being committed (G.A. 365–366), the F.B.I. surveilled the expert, whose name was Bernard Spindel, and he, in turn, intercepted the radio communications among the agents who were surveilling him (7 D.A. 3314–3325; 1 D.A. 336).

[21] *Coplon* v. *United States*, 191 F. 2d 749 (C.A.D.C.), certiorari denied, 342 U.S. 926, and *Caldwell* v. *United States*, 205 F. 2d 879 (C.A.D.C.), are inapposite for the same reason. Both of those cases involved actual, not merely apprehended, interferences with the attorney-client relationship.

corporated into a formal report produced for defense inspection under 18 U.S.C. 3500 (Parks Pet. 15–19) was answered by *Killian* v. *United States*, 368 U.S. 231, 242:

> As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of [the witness'] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. * * *

See also *United States* v. *Hilbrich*, 341 F. 2d 555, 557 (C.A. 7), certiorari denied, 381 U.S. 941; *Ogden* v. *United States*, 323 F. 2d 818, 820–821 (C.A. 9), certiorari denied, 376 U.S. 973; *United States* v. *Greco*, 298 F. 2d 247, 249–250 (C.A. 2), certiorari denied, 369 U.S. 820.

Brady v. *Maryland*, 373 U.S. 83, is obviously inapplicable when, as here, the substance of the routinely destroyed matter is fully disclosed to the defense through statements produced pursuant to 18 U.S.C. 3500. Nor, as in *United States* v. *Lonardo*, 350 F. 2d 523 (C.A. 6), were the handwritten notes destroyed "on the eve of trial" (350 F. 2d at 529). Moreover, the agent here testified that his formal re-

port, like his handwritten notes, constituted "substantially a verbatim recital" of what he had been told by the witness (2 D.A. 785, 786); in *Lonardo* there were "substantial variances" between the destroyed interview transcript (which had been taken by an F.B.I. stenographer) and the formal F.B.I. interview report, 350 F. 2d at 527.

3. Petitioner King contends that government counsel improperly referred on three occasions to his having asserted the Fifth Amendment privilege against self-incrimination when he was called during the Test-Fleet trial to testify at a closed hearing held by Judge Miller on the government's motion to disqualify Mrs. Paschal as a juror (King Pet. 31). The short answer to this claim is that petitioner himself opened the door to such cross-examination and comment by discussing the incident on direct examination and testifying that he then "felt that Judge Miller, knowing the gentleman, was suggesting to me that I did not have to testify *and that I shouldn't* to protect my own rights and I didn't testify" (5 D.A. 2330) (emphasis added). Petitioner sought by this testimony to imply to the jury not merely that he had asserted a legal option not to testify, but that the district judge presiding at the hearing was a personal friend who, besides advising him of his right not to testify, had "suggested" to him that he "shouldn't."

The fact—so heavily relied on by petitioner (King Pet. 33)—that King "did not mention the Fifth Amendment, and a lay jury would not have gathered from King's testimony that his choice of silence had been in exercise of his constitutional privilege" pro-

vided all the more reason why government counsel could reasonably have assumed that he was entitled to inquire further into the matter so as to dispel the misapprehension which petitioner's testimony had created. For while the prior invocation by a defendant of the privilege against self-incrimination may not usually be the subject of cross-examination, this rule does not entitle defendants to bolster their defense by misrepresenting either the nature of the privilege or the circumstances under which it was asserted and by falsely ascribing the invocation of the privilege to the "suggestion" of a district judge. Compare *Walder* v. *United States,* 347 U.S. 62. Indeed, government counsel had substantial grounds for belief in this case that the privilege had been asserted not as a result of Judge Miller's warning but because of a signal given King by petitioner Hoffa, who was present at the hearing (6 D.A. 2780–2781). Under these circumstances, it was entirely proper for the government to seek to rebut King's false assertion by inquiring of him and of Hoffa whether the signal had been given as well as by specifying for the jury's consideration the precise testimonial privilege invoked.

Although we believe that in these circumstances it would have been proper to have required petitioners King and Hoffa to respond to the prosecutor's questions,[22] the district court, out of an excess of caution,

[22] Neither *Grunewald* v. *United States*, 353 U.S. 391, nor *Stewart* v. *United States*, 366 U.S. 1, involved situations in which the defendant had sought to use the invocation of the privilege to his advantage, and in neither case had he referred to it in direct examination.

sustained objections to the questions (5 D.A. 2384; 6 D.A. 2779–2781). In light of this ruling, which made it clear to the jury that the matter was not appropriate for its consideration, there is no basis for petitioner's claim that what occurred constituted reversible error.

Nor was the prosecutor's brief reference to the Fifth Amendment in the course of his summation grounds for a mistrial. It was, for the reasons we have stated, permissible comment on a matter injected into the case—albeit in misleading form—by petitioner himself. In any event, the judge instructed the jury to disregard "the argument of counsel in that respect" (7 D.A. 3113). It must have been entirely clear to the jury, in context, that the "argument" referred to was the argument made by government counsel. Finally, the court's instructions to the jury contained a warning that "no adverse inference" was to be drawn against any witness because he had exercised his constitutional privilege against self-incrimination (7 D.A. 3165). This adequately cured whatever possibility existed that improper inferences might be drawn from petitioner's earlier invocation of the Fifth Amendment privilege.

4. There is no merit to either of petitioner Hoffa's challenges to the government's summation (Hoffa Pet. 80–82). Petitioner's contention is that government counsel could not call the jury's attention to the fact that Hoffa's demeanor in the courtroom at the trial below showed that he was "in complete control of the case" and could not therefore have been unaware of his asso-

ciates' attempts to influence jurors in the Test-Fleet case (Hoffa Pet. 44). This was permissible rebuttal to the defense claim that Hoffa was ignorant of his associates' criminal activities in the Test-Fleet case. A reference to courtroom demeanor is no different from the identification of a criminal defendant by a witness in court. Just as the latter is not "adverse comment" on the defendant's constitutional right to be present at at his trial, so is the former not "adverse comment" on his constitutional right to participate in his own trial. In any event, this contention was not made in the court of appeals; [33] it is not, therefore, subject to review in this Court. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Husty* v. *United States*, 282 U.S. 694, 701–702.

Nor was it necessary for the district court to declare a mistrial because government counsel stated in summation that he would not ask a jury to convict unless he believed that guilt had been proved. Assuming, *arguendo*, that this sort of statement should not be made in ordinary circumstances,[34] in the present case

[33] In fact, the entire opening summation for the government was omitted from the Appellants' Joint Appendix. See 7 D.A. 3110.

[34] But see *Thompson* v. *United States*, 272 F. 2d 919, 921 (C.A. 5), certiorari denied, 362 U.S. 940; *Schmidt* v. *United States*, 237 F. 2d 542, 543 (C.A. 8); *Henderson* v. *United States*, 218 F. 2d 14, 19 (C.A. 6), certiorari denied, 349 U.S. 920; *United States* v. *Battiato*, 204 F. 2d 717, 718–719 (C.A. 7), certiorari denied, 346 U.S. 871. In all these cases it was held not improper for the prosecutor to make such a statement so long as the belief was based on the evidence introduced and did not suggest to the jury that the prosecutor knew of other evidence, unknown to the jury, justifying his belief.

the personal integrity of government counsel had been attacked in the defense summations (see the quotations in the court of appeals' opinion, Hoffa Pet. App. 52a). It was entirely appropriate for government counsel to respond to these attacks as he did. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 240–242. Indeed, in *Greenberg* v. *United States*, 280 F. 2d 472, 475 (C.A. 1), which petitioner cites as conflicting with the present decision, the court of appeals explicitly recognized that a personal attack upon counsel may justify a reply of the sort involved here.

In any event, the district court in this case immediately instructed the jury to disregard counsel's statement (7 D.A. 3126a–3127a). This factor further distinguishes the present case from *Greenberg*, where the court "ruled in the presence of the jury that the prosecutor had a right to argue 'his belief in the evidence.'" 280 F. 2d at 474.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965